2003

C.A. Johnson Trenching, L.C. v. Vermeer Manufacturing Co. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

C.A. JOHNSON TRENCHING, L.C., Plaintiff and Appellant, vs. VERMEER MANUFACTURING CO., Defendant and Appellee.	Case No. 20030714-CA

BRIEF OF APPELLEE

APPEAL FROM THE RULING OF THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

HONORABLE LYNN W. DAVIS, DISTRICT COURT JUDGE

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The issue on appeal is whether the trial court committed reversible error in ruling that Johnson's claims were barred by the economic loss doctrine and the disclaimer of all implied warranties.

This is an appeal from the trial court's granting of Vermeer's motion to dismiss for failure to state a claim. This Court reviews the trial court's ruling for correctness. Hunter v. Sunrise Title Company, 2004 UT 1, 84 P.3d 1163, 1165 (Utah 2004).

DETERMINATIVE LAW

The following statutes and rules are determinative of the issue presented in this appeal:

Section 70A-2-316 of the Uniform Commercial Code, as adopted by the Utah legislature, provides in relevant part:

> [T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

Utah Code Ann. § 70A-2-316(2) (2003).

Rules 12(b)(6) and 56, Utah Rules of Civil Procedure.

Complete texts of these statutes and rules are provided in the Appendix as Exhibit A.

STATEMENT OF THE CASE

C.A. Johnson Trenching, L.C. ("Johnson") purchased a Model T855 Trencher from Vermeer Manufacturing Company's ("Vermeer") independent, authorized dealer in Salt Lake City, Utah on July 19, 1999. Johnson alleges that the trencher "became wholly disabled as a result of a mechanical failure" on September 24, 2002, over three years after its purchase. Johnson filed a lawsuit against Vermeer relating to the alleged failure of the subject trencher on March 28, 2003. In its Complaint, Johnson asserted claims for strict liability, negligence, and breach of the implied warranties of merchantability and fitness for a particular purpose.

On May 13, 2003, Vermeer filed a Motion to Dismiss on the grounds that: (1) Johnson's strict liability and negligence claims were barred by the economic loss rule; and (2) Johnson's breach of implied warranty claim was barred because the implied warranties of merchantability and fitness for a particular purpose were expressly disclaimed by Vermeer's Limited Warranty for Industrial Equipment.

After full briefing, the District Court Judge, Lynn W. Davis, ruled in favor of Vermeer and entered an Order Granting Vermeer's Motion to Dismiss with Prejudice on July 30, 2003. Johnson now appeals from that Order of Dismissal.[1]

[1] Johnson appeals the dismissal of its strict liability and breach of implied warranty claims. Johnson does not appeal the dismissal of its negligence claim. Accordingly, the negligence claim is not addressed here.

STATEMENT OF FACTS

On July 19, 1999, C.A. Johnson Trenching, L.C. purchased a Model T855 trencher, Serial No. 102 (the "trencher"), from Vermeer's independent, authorized dealer in Salt Lake City, Utah. (R. 5). Upon purchasing the trencher, Johnson received Vermeer's Limited Warranty for Industrial Equipment ("Limited Warranty"). The Limited Warranty provides the buyer with a manufacturer's warranty from defects in material and workmanship, under normal use and service, for one year after delivery to the owner, or 1000 operating hours, whichever occurs first. (R. 23). A copy of Vermeer's Limited Warranty is included in the Appendix as Exhibit B.

Vermeer's Limited Warranty expressly disclaims all implied warranties:

> This warranty and any possible liability of Vermeer Manufacturing Company hereunder is in lieu of all other warranties, express, implied, or statutory, including, but not limited to, any warranties of merchantability or fitness for a particular purpose.

(R. 23) (emphasis added). Johnson agreed to the terms of the Limited Warranty by filling out and signing the Warranty Registration Form. Johnson expressly acknowledged it was "familiar with the Limited Warranty Statement in the operator's manual." (R. 21). The Warranty Registration Form is included in the Appendix as Exhibit C.

On March 28, 2003, Johnson filed a lawsuit alleging the failure of the Model T855 trencher sold by Vermeer's independent, authorized dealer. In its Complaint, Johnson alleged "the trencher became wholly disabled as a result of a mechanical failure . . . " over three years after its purchase (R. 4). Johnson asserted causes of action for strict

liability, negligence, and breach of implied warranties of fitness for a particular purpose and merchantability. (R. 2-4). Johnson's Complaint sought general and special damages, including recovery for lost profits. (R. 4). The Complaint did not seek damages with respect to any personal injuries incurred or damage to any property other than the trencher itself. See id.

On May 13, 2003, Vermeer filed a Motion to Dismiss on the grounds that: (1) Johnson's strict liability and negligence claims were barred by the economic loss rule; and (2) Johnson's breach of warranty claim was barred because the implied warranties of merchantability and fitness for a particular purpose were expressly disclaimed by Vermeer's Limited Warranty. (R. 9-27).

After full briefing, the District Court Judge, Lynn W. Davis, ruled in favor of Vermeer and entered an Order Granting Vermeer's Motion to Dismiss with Prejudice on July 30, 2003. Johnson now appeals from that Order of Dismissal. (R. 49-50, 62). Copies of Judge Davis' Ruling on Defendant Vermeer's Motion to Dismiss and Order of Dismissal with Prejudice are included in the Appendix as Exhibit D.

Johnson now appeals the dismissal of its strict liability and breach of implied warranty claims. Johnson does not appeal the dismissal of its negligence claim, which the trial court ruled was also barred by the economic loss rule.

SUMMARY OF THE ARGUMENT

The trial court did not commit reversible error in finding that Johnson's claims were barred. Johnson is not entitled to relief under the facts alleged in its Complaint, or

any set of facts, for two reasons: ***first***, the economic loss rule bars Johnson's strict liability claim; and ***second***, Johnson's breach of warranty claims are barred because the implied warranties of merchantability and fitness for a particular purpose were expressly disclaimed by Vermeer. Accordingly, this Court should affirm the trial court's ruling dismissing Johnson's Complaint with prejudice.

ARGUMENT

A. The Economic Loss Rule Bars Johnson's Strict Liability Claim.

Johnson argues that its strict liability claim was improperly dismissed by the trial court because it properly plead all necessary elements of a strict liability claim under section 402A of the Restatement (Second) of Torts adopted by the Utah Supreme Court in Hahn v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979). Johnson, however, entirely ignores the complete defense provided by the economic loss rule raised by Vermeer in its motion to dismiss, and relied upon by the trial court in dismissing Johnson's strict liability claim. Whether Johnson properly plead the elements for a strict liability claim, therefore, is irrelevant. The proper issue before the Court is whether the trial court correctly determined that Johnson's strict liability claim is barred by the economic loss rule.

Under Utah law, Johnson cannot recover from Vermeer under the theory of strict liability for economic losses (i.e. lost profits, repair costs to the product itself) because the economic loss rule precludes recovery of such damages under tort theories of liability. Utah courts adhere to the majority position that a plaintiff may not recover economic losses under a theory of non-intentional tort. See American Towers Owners Ass'n v. CCI

Mechanical, Inc., 930 P.2d 1182 (Utah 1996); see also, e.g., East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866-75 (1986). Economic loss is defined as:

> damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property . . . as well as the "diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold."

American Towers Owners Association, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996), quoting Maack v. Resource Design & Construction, Inc., 875 P.2d 570, 579-80 (Utah Ct. App. 1994) (emphasis added). In other words, under Utah law, economic damages are not recoverable in strict liability absent damage to property other than the subject product or bodily injury.

Johnson's Complaint sought general and special damages, as well as recovery of lost profits during the time period that Johnson was allegedly unable to use the trencher in its normal course of business. (R. 1-3). The Complaint did not seek damages with respect to any personal injuries incurred by anyone or damage to property other than the trencher itself. However, Utah law squarely prohibits product purchasers from suing in tort to recover purely economic losses arising from disputes governed by contract law. See SME Industries, Inc. v. Thompson, Venutlett & Associates, Inc., 28 P.2d 669 (Utah 2001); American Towers Owners Ass'n v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996).

The seminal case in Utah addressing the application of the economic loss rule is American Towers Owners Association, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182

(Utah 1996). In that case, the American Towers Condominium Association filed suit against a number of defendants, alleging that the defendants negligently failed to properly design, construct, and supervise the construction of the condominium complex. See id. at 1188. The condominium association claimed economic losses resulting from design and construction defects in the plumbing and mechanical systems of the condominium complex, but did not allege personal injury or damage to property apart from the complex itself. See id. The Utah Supreme Court affirmed the district court's dismissal of the plaintiff's negligence claims, stating that "economic damages are not recoverable in [tort] absent physical property damage or bodily injury." Id. at 1188-92; see also Schafir v. Harrigan, 879 P.2d 1384 (Utah Ct. App. 1994) (stating that home purchasers could not recover economic losses based upon defects caused by allegedly negligent construction of home).

In American Towers, the Utah Supreme Court explained the public policy behind the economic loss rule as follows:

> When a product does not perform or last as long as the consumer thinks it should, the claim pertains to the quality of the product as measured by the buyer's and user's expectations—expectations which emanate solely from the purchase transaction. Thus, contract principles resolve issues when the product does not meet the user's expectations, while tort principles resolve issues when the product is unsafe to person or property.

Id. at 1190. The economic loss rule "arises from intrinsic differences between tort and contract law." Maack v. Resource Design & Construction, Inc., 875 P.2d 570, 580 (Utah Ct. App. 1994). "Contract law protects expectancy interests created through agreement

between the parties, while tort law protects individuals and their property from physical harm by imposing a duty to exercise reasonable care." Id.

Johnson's strict liability claim is precisely the kind of claim that the economic loss rule is designed to preclude. Johnson purchased a Model T855 trencher that came with a manufacturer's Limited Warranty for one full year after delivery to the owner, or 1000 operating hours, whichever occurred first. Johnson contends that over three years after purchase, the trencher "became wholly disabled as a result of a mechanical failure of the trencher caused by defect flaws in the design." (R. 4). Johnson did not contend that any physical injuries were sustained as a result of the alleged defect, nor did Johnson seek reimbursement for any property damage other than damage to the trencher itself. Instead, Johnson merely sought damages caused by an allegedly defective trencher that became disabled. These allegations must be adjudicated exclusively in the world of contract and warranty law. Johnson may not circumvent the legal regime applicable to the purchase of the trencher by casting its claims in tort. Johnson's strict liability is legally barred. Hence, the trial court correctly granted Vermeer's motion to dismiss Johnson's strict liability claim based upon the economic loss rule.

B. Vermeer's Limited Warranty Effectively Disclaimed the Implied Warranties of Merchantability and Fitness for a Particular Purpose.

In its Complaint, Johnson asserted a claim for breach of the implied warranties of merchantability and fitness for a particular purpose.[2] However, the implied warranties of merchantability and fitness for a particular purpose were both expressly disclaimed by Vermeer in the Limited Warranty that Johnson received and acknowledged on the date the trencher was purchased.

Section 70A-2-316 of the Uniform Commercial Code, as adopted by the Utah legislature, provides that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." Utah Code Ann. § 70A-2-316(2) (2003). The Limited Warranty provides in relevant part, "This warranty and any possible liability of Vermeer Manufacturing Company hereunder is in lieu of all other warranties, express, implied, or statutory, including, but not limited to, any warranties of merchantability or fitness for a particular purpose." The Limited Warranty conspicuously and expressly excludes the implied warranties of fitness and merchantability according to the provisions of Utah Code Ann. § 70A-2-316(2).

Moreover, Johnson explicitly agreed to the terms of the limited warranty by filling out and signing the warranty registration form on the date the trencher was purchased.

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[2] Paragraph 15 of the Complaint states, "Defendant Vermeer Manufacturing Co.'s trencher was not fit for the ordinary purpose for which the trencher was to be used and was unmerchantable within the meaning of § 78-2-14 (sic), nor was the gear box, pump and shaft assembly and their component parts fit for the particular purpose for which they were designed within the meaning of § 70A-2-315." (R. 3).

By signing the warranty registration form, Johnson, through its agent, expressly acknowledged familiarity with the Limited Warranty, including the disclaimer of implied warranties.

Despite this, Johnson argues it never specifically agreed or assented to be bound by Vermeer's disclaimer. Under Utah law, a disclaimer of warranties is effective where the seller conspicuously and expressly excludes warranties of fitness and merchantability. Billings Yamaha v. Rick Warner Ford, Inc., 681 P.2d 1276, 1278 (Utah 1984). To properly disclaim warranties of merchantability, the disclaimer must specifically mention merchantability. Utah Code Ann. § 70A-2-316(2). With respect to warranties of fitness, "[l]anguage is sufficient to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'" Id. Even where the disclaimer is relatively inconspicuous, the Utah Supreme Court has explained that the disclaimer will nevertheless be binding on the buyer if "the provision was actually called to his attention." Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009, 1012 (Utah 1976).

The decision in Rawson v. K & K Sales, Inc., 2001 UT 24, 20 P.2d 876 (Utah 2001) is instructive to the disclaimer issue presented here. In Rawson, plaintiffs James and Rebecca Rawson purchased a salvage-titled van from defendant K & K Sales. Plaintiffs signed a sales contract acknowledging the vehicle came with "no warranties, express or implied, including but not limited to any implied warranty of merchantability [or] fitness for a particular purpose." Id. at 886. The Utah Supreme Court upheld the trial court's grant of defendant's summary judgment motion on plaintiffs' claims for

breach of implied warranties finding that the implied warranties of merchantability and fitness for a particular purpose were expressly excluded by disclaimers in the sales documents plaintiffs signed. Id.

Here, as in Rawson, the language of the disclaimer complies with the requirements of Section 70A-2-316, and the provision was specifically called to Johnson's attention as evidenced by the signature of its agent on the warranty registration form. There is no evidence to suggest that Johnson, a professional trenching company, was unfamiliar with commercial practices or warranty provisions when it's agent signed the warranty registration form.

Finally, the Utah Supreme Court has held that where the buyer accepts a disclaimer in exchange for coverage under the limited warranty, it is binding on the parties. See Boud v. SDNCO, Inc., 2002 UT 83, 54 P.3d 1131 (finding that disclaimer was valid where, upon signing the contract, 10 days after tendering purchase price, buyer became entitled to delivery of goods and coverage under limited warranty). Here, Johnson signed the warranty registration form, thereby agreeing to the disclaimer of implied warranties in consideration for coverage under the Limited Warranty.

Under these authorities, the implied warranties of fitness for a particular purpose and merchantability were effectively disclaimed by Vermeer's Limited Warranty. Accordingly, the trial court correctly dismissed Johnson's cause of action for breach of implied warranties.

CONCLUSION

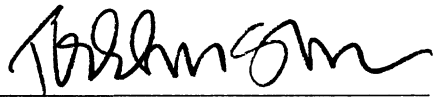
The trial court correctly dismissed Johnson's Complaint. Johnson's claims are legally barred by the economic loss doctrine and disclaimer of implied warranties. Accordingly, this Court should affirm the trial court's ruling granting Vermeer's Motion to Dismiss with Prejudice.

ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, Vermeer's appendix of important documents is bound as part of this brief.

DATED this 21st day of May, 2004.

Snell & Wilmer L L P



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CERTIFICATE OF SERVICE

This is to certify that the foregoing BRIEF OF APPELLEE was mailed, postage prepaid this 24th day of May, 2004, to the following:

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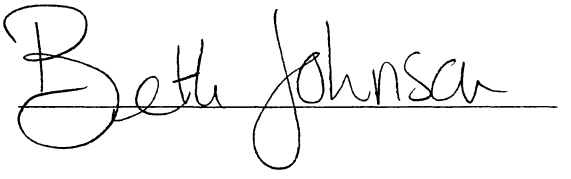

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Tab A

70A-2-310. Open time for payment or running of credit — Authority to ship under reservation.

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 70A-2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by Subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period. 1965

70A-2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (Subsection (3) of Section 70A-2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in Subsections (1)(c) and (3) of Section 70A-2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods. 1965

70A-2-312. Warranty of title and against infringement — Buyer's obligation against infringement.

(1) Subject to Subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under Subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications. 1965

70A-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. 1965

70A-2-314. Implied warranty — Merchantability — Usage of trade.

(1) Unless excluded or modified (Section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade. 1965

70A-2-315. Implied warranty — Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. 1965

70A-2-316. Exclusion or modification of warranties — Livestock.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 70A-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to Subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing

l conspicuous. Language to exclude all implied warranties itness is sufficient if it states, for example, that "There are warranties which extend beyond the description on the face eof."

3) Notwithstanding Subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

4) Remedies for breach of warranty can be limited in ordance with the provisions of this chapter on liquidation limitation of damages and on contractual modification of ıedy (Sections 70A-2-718 and 70A-2-719).

5) If a contract for the sale of livestock, which may include tle, hogs, sheep, and horses, does not contain a written tement as to warranty of merchantability or fitness for a ticular purpose, there shall be no implied warranty that livestock are free from disease and sickness at the time of sale and the seller shall not be liable for damages arising n the lack of merchantability or fitness for a particular pose. 1981

A-2-317. Cumulation and conflict of warranties express or implied.

Varranties whether express or implied shall be construed consistent with each other and as cumulative, but if such struction is unreasonable the intention of the parties shall ermine which warranty is dominant. In ascertaining that ention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. 1965

A-2-318. Third-party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to r person who may reasonably be expected to use, consume be affected by the goods and who is injured by breach of the rranty. A seller may not exclude or limit the operation of s section with respect to injury to the person of an individ- to whom the warranty extends. 1977

A-2-319. F.O.B. and F.A.S. terms.

1) Unless otherwise agreed the term F.O.B. (which means e on board") at a named place, even though used only in nection with the stated price, is a delivery term under ich

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (Section 70A-2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (Section 70A-2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (Section 70A-2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within Subsection (1)(a) or (c) or Subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of co-operation under this chapter (Section 70A-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents. 1965

70A-2-320. C.I.F. and C.&F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.&F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C.&F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

Cited in Walker v. Carlson, 740 P.2d 1372 (Utah Ct. App. 1987); State v. Perdue, 813 P.2d 1201 (Utah Ct. App. 1991); Rimensburger v. Rimensburger, 841 P.2d 709 (Utah Ct. App. 1992); Crowther v. Mower, 876 P.2d 876 (Utah Ct. App. 1994); Astill v. Clark, 956 P.2d 1081 (Utah Ct. App. 1998); Stavros v. Office of Legislative Research & Gen. Counsel, 2000 UT 63, 15 P.3d 1013.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Attorney's Fees, 1989 Utah L. Rev. 342.

Case Law Development: I. Appellate Review and Procedure, 1998 Utah L. Rev. 585.

Brigham Young Law Review. — Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, 1981 B.Y.U. L. Rev. 579.

Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 B.Y.U. L. Rev. 597.

Note, Appellate Review of Rule 11 Issues — De Novo or Abuse of Discretion? *Thomas v. Capital Security Services, Inc.*, 1989 B.Y.U. L. Rev. 877.

Rule 11 and Federalizing Lawyer Ethics, 1991 B.Y.U. L. Rev. 959.

Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule, 1993 B.Y.U. L. Rev. 879.

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 339 to 349.

C.J.S. — 71 C.J.S. Pleading §§ 339 to 366.

A.L.R. — Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

Comment Note — General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 A.L.R. Fed. 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 A.L.R. Fed. 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 A.L.R. Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in antitrust actions, 99 A.L.R. Fed. 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556.

Rule 12. Defenses and objections.

(a) *When presented.* Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) *How presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of

service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) *Waiver of defenses.* A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) *Pleading after denial of a motion.* The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) *Security for costs of a nonresident plaintiff.* When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) *Effect of failure to file undertaking.* If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990; November 1, 2000.)

Amendment Notes. — The 2000 amendment in Subdivision (a) added the language beginning "within the state and within thirty days" at the end of the first sentence and "but a motion directed" at the end of the last sentence, and made stylistic changes throughout.

Compiler's Notes. — This rule is similar to Rule 12, F.R.C.P.

Cross-References. — Motions generally, U.R.C.P. 7.

NOTES TO DECISIONS

Jurisdiction over the person.

When urging the trial court to exercise personal jurisdiction based only on documentary evidence, a plaintiff must make only a prima facie showing that the trial court has personal jurisdiction over the nonresident defendant in order to proceed to trial on the merits. Anderson v. American Soc'y of Plastic Surgeons, 807 P.2d 825 (Utah 1990), cert. denied, 502 U.S. 900, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991).

Trial court erred in granting a Nevada casino's motion to dismiss a Utah patron's personal injury suit, where the patron's complaint alleged sufficient facts to support general personal jurisdiction over the casino by the State of Utah. Ho v. Jim's Enters., Inc., 2001 UT 63, 29 P.3d 633.

Motion for judgment on pleadings.

Motion for judgment on the pleadings to decide upon distribution of trust assets was inappropriate in a proceeding among trust beneficiaries to determine distribution and offsets. Cafferty v. Hughes, 2002 UT App 105, 46 P.3d 233.

—Matters outside of pleadings.

——Answers to interrogatories.

Answers to interrogatories are not a part of

were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued Fibreboard Paper Prods Corp v Dietrich, 25 Utah 2d 65, 475 P 2d 1005 (1970)

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion Griffiths v Hammon, 560 P 2d 1375 (Utah 1977)

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment Buckner v Main Realty & Ins Co , 4 Utah 2d 124, 288 P 2d 786 (1955) (but see Central Bank & Trust Co v Jensen, supra, and Rule 58A(d)

Cited in Utah Sand & Gravel Prods Corp v Tolbert, 16 Utah 2d 407, 402 P 2d 703 (1965), J P W Enters , Inc v Naef, 604 P 2d 486 (Utah 1979), Katz v Pierce, 732 P 2d 92 (Utah 1986), Lund v Brown, 2000 UT 75, 11 P 3d 277

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah Graham v Sawaya, 1981 B Y U L Rev 937

Am. Jur. 2d. — 46 Am Jur 2d Judgments § 265 et seq

C.J.S. — 49 C J S Judgments §§ 187 to 218

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A L R 3d 1070

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A L R 3d 1272

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A L R 3d 586

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A L R 3d 1255

Failure to give notice of application for default judgment where notice is required only by custom, 28 A L R 3d 1383

Failure of party or his attorney to appear at pretrial conference, 55 A L R 3d 303

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A L R Fed 190

Rule 56. Summary judgment.

(a) *For claimant* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997.)

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

Tab B

VERMEER EQUIPMENT LIMITED WARRANTY

VERMEER MANUFACTURING COMPANY, hereinafter sometimes referred to as "Manufacturer", warrants each new industrial product of its own manufacture to be free from defects in material and workmanship, under normal use and service for one full year after delivery to the owner or 1000 operating hours, whichever occurs first. During the warranty period, the authorized selling Vermeer Dealer shall furnish parts without charge for any Vermeer product that fails because of defects in material and workmanship. Warranty is void unless warranty registration card is returned within ten days from the date of purchase. This warranty and any possible liability of Vermeer Manufacturing Company hereunder is in lieu of all other warranties, express, implied, or statutory, including, but not limited to, any warranties of merchantability or fitness for a particular purpose.

The parties agree that the Buyer's SOLE AND EXCLUSIVE REMEDY against Manufacturer, whether in contract or arising out of warranties, representations, instructions, or defects shall be for the replacement or repair of defective parts as provided herein. In no event shall Manufacturer's liability exceed the purchase price of the product. The Buyer agrees that no other remedy (including, but not limited to, incidental or consequential loss) shall be available to him. If, during the warranty period, any product becomes defective by reason of material or workmanship and Buyer immediately notifies Manufacturer of such defect, Manufacturer shall, at its option, supply a replacement part or request return of the product to its plant in Pella, Iowa. No parts shall be returned without prior written authorization from Manufacturer, and this Warranty does not obligate the Manufacturer to bear any transportaton charges in connection with the repair or replacement of defective parts. The Vermeer Manufacturing Company will not accept any charges for labor and/or parts incidental to the removal or remounting of parts repaired or replaced under this Warranty.

This Warranty shall not apply to any part or product which shall have been installed or operated in a manner not recommended by the Vermeer Manufacturing Company, nor to any part or product which shall have been neglected, or used in any way which, in the Manufacturer's opinion, adversely affects its performance; nor negligence of proper maintenance or other negligence, fire or other accident; nor with respect to wear items included but not limited to items such as backhoe bucket teeth, digger chain, sprocket, cutters and bases, dirt augers and sprocket, drive chains and sprockets, plow blades, seats, brake pads, cutter wheel and segments, trench cleaners, tree spade blades and wear strips, stump cutter wheel, pockets and teeth, brush chipper knives, fan belts, water hoses, lights on light kits; nor if the unit has been altered or repaired outside of a Vermeer Manufacturing Company authorized dealership in a manner of which, in the sole judgment of Vermeer Manufacturing Company affects its performance, stability or reliability; nor with respect to batteries which are covered under a separate adjustment warranty; nor to any product in which parts not manufactured or approved by the Manufacturer have been used, nor to normal maintenance services or replacement of normal service items. Equipment and accessories not of our manufacture are warranted only to the extent of the original Manufacturer's Warranty and subject to their allowance to us, if found defective by them.

Vermeer Manufacturing Company reserves the right to modify, alter, and improve any product or parts without incurring any obligation to replace any product or parts previously sold with such modified, altered, or improved product or part.

No person is authorized to give any other Warranty, or to assume any additional obligation on the Manufacturer's behalf unless made in writing, and signed by an officer of the Manufacturer.

VERMEER MANUFACTURING COMPANY
Pella, Iowa

Tab C

LIMITED WARRANTY FOR INDUSTRIAL EQUIPMENT

Model 1855 Serial # 102

Customer Type C Primary Use E

(See Market Classifications Below)

NOTE: To validate warranty coverage, this form must be filled out, signed, and returned at the time of delivery to first owner. This report will not be acceptable if incomplete or falsified in any way.

Delivery date 7-19-99

Dealer Loc. SLC

Owner/Company C A Johnson EX

Company Contact AARON JOHNSON

Contact Title G. M.

Address BOX 132

County _____ City Springville

State/Prov UT Zip/Post. Code 84663

Country USA

Tel 435-489-5036

Fax _____

Attachment _____ Serial # _____

Attachment _____ Serial # _____

RECEIVED 2009

I, the owner, hereby acknowledge that:

- I have received and will read the operator's manual before operating or servicing the machine.
- I have read and understand the safety decals on the machine and safety instructions in the manual.
- The dealer explained safety, operation, and service of the machine.
- I am familiar with the Limited Warranty Statement in the operator's manual.
- I have been advised and understand that dealers are independent dealers and not agents or employees of Vermeer Manufacturing Company and therefore have no authority to make representations on behalf of Vermeer Manufacturing Company.

Owner's Signature _____

Date 7/19/1999

Print Name P. AARON JOHNSON

I, the dealer, acknowledge that:

- I have provided the owner with the operator's manual and have instructed him concerning safety, proper operation, service, and the Limited Warranty of the machine.
- I have examined the machine according to the predelivery check sheet contained in the operator's manual and, having made all necessary adjustments, find the machine ready for customer field use.

5-18-99

Dealer Signature _____

Date 7/19/1999

Salesperson GARY SLOVAK

Tab D

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

C A JOHNSON TRENCHING, L C , Plaintiff, vs VERMEER MANUFACTURING CO , Defendant	**RULING ON DEFENDANT'S MOTION TO DISMISS** Civil No 030401491 Judge Lynn W Davis

This matter comes before the Court on Defendant's Motion to Dismiss The Court having read the Motions of the Parties now makes the following ruling

UNDISPUTED FACTS

1 Plaintiff C A Johnson Trenching, L C purchased a Model T855 trencher, Serial No 102, from defendant Vermeer Manufacturing Company's independent authorized dealer in Salt Lake City on July 19, 1999

2 On March 28, 2003, plaintiff filed this lawsuit alleging that the Model T855 trencher sold by Vermeer's independent authorized dealer in Salt Lake City "became wholly disabled as a result of mechanical failure" on September 24, 2002, over three years after it purchase

ANALYSIS

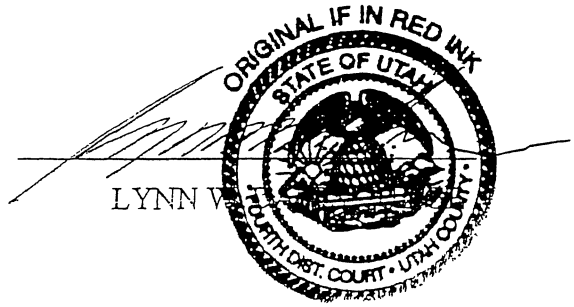
It is well settled that a plaintiff cannot recover economic losses for strict liability or negligence claims absent damage to property other than the subject product or bodily injury *American Towers Owners Association Inc v CCI Mechanical Inc* , 930 P 2d 1182 (Utah 1996) In this case, plaintiff does not allege property damage or bodily injury As such plaintiff's claim for economic loss under the theories of strict liability and negligence fails

Section 70A-2-316 of the Uniform Commercial Code, as adopted by the Utah legislature, provides that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by writing and conspicuous." Utah Code Ann. § 70A-2-316(2) (2002). In this case, the limited warranty signed by the plaintiff expressly disclaims the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. The plaintiff offered no case law to refute the proper disclaimer of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Furthermore, the defendant properly followed the directives of the Uniform Commercial Code and specifically mentioned in writing the two implied warranties.

CONCLUSION AND RULING

Because the Court finds that plaintiff fails to state a claim upon which relief can be granted, defendant Motion for Summary Judgment is GRANTED.

DATED this 11 day of July, 2003.



LYNN W

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030401491 by the method and on the date specified.

METHOD	NAME
Mail	KAMIE F BROWN ATTORNEY DEF 15 WEST SOUTH TEMPLE SUITE 1200 SALT LAKE CITY, UT 84101
Mail	THOMAS W SEILER ATTORNEY PLA 80 NORTH 100 EAST P.O. BOX 1266 PROVO UT 84603-1266

Dated this 15 day of July, 2003.

Deputy Court Clerk

Todd M. Shaughnessy (6651)
Kamie F Brown (8520)
Snell & Wilmer LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Defendant Vermeer Manufacturing Co.

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

C.A. JOHNSON TRENCHING, L.C , Plaintiff, vs. VERMEER MANUFACTURING CO., Defendant.	**ORDER OF DISMISSAL WITH PREJUDICE** Case No. 030401491 Division 9

Based upon the motion of Defendant Vermeer Manufacturing, Co , supporting and opposing papers, and good cause appearing,

IT IS HEREBY ORDERED that Defendant's motion be and hereby is granted, and that the above-captioned matter be and hereby is dismissed with prejudice.

DATED this 30 day of July, 2003.

BY THE COURT:

Honorable Lynn Davis

Approval as to Form:

Thomas W. Seiler
ROBINSON SEILER & GLAZIER